85-1757

Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

BERNARD H. DEMPSEY, JR., ESQ.
(Counsel of Record)
FERDINAND M. ROMANO, ESQ.
RICHARD LEE BARRETT, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
ALI A. AZIMA, M.D.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

BERNARD H. DEMPSEY, JR., ESQ.
FERDINAND M. ROMANO, ESQ.
RICHARD LEE BARRETT, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
ALI A. AZIMA, M.D.

QUESTIONS PRESENTED

1. Whether Section 458.331(1)(t), Florida Statutes, is violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is so vague that it fails to provide physicians with adequate notice of what medical malpractice standards will be applied in administrative proceedings to determine whether a medical license may be suspended.

2. Whether a statute which authorizes a state administrative agency to revoke a physician's license to practice medicine comports with the due process provision of the Fourteenth Amendment to the United States Constitution when that statute requires only that, as a threshold standard of proof, there exist some competent substantial evidence of a violation and the level of that competent substantial evidence is not substantially

greater than that required to support conventional administrative action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
OPINION BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	4
A. Summary of Findings and Recommendations	4
B. Summary of Issues	6
REASONS FOR GRANTING THE WRIT	16
I. SECTION 458.331(1)(t), FLA. STAT., IS UNCONSTITUTIONAL BECAUSE IT LACKS REASONABLY CLEAR GUIDELINES SO AS TO PREVENT OFFICIAL ARBITRARINESS IN THE REVOCATION OF CONSTITUTIONALLY PROTECTED PROPERTY INTEREST AND HAS BEEN APPLIED IN A MANNER WHICH IS SO VAGUE THAT IT DENIED PETITIONER ADEQUATE NOTICE OF THE STANDARDS FOR ENFORCEMENT.	16
II. THE DECISIONS BELOW ARE BASED ON A THRESHOLD STANDARD OF SUBSTANTIAL COMPETENT EVIDENCE WHICH STANDARD IS VIOLATIVE OF PETITIONER'S RIGHT TO	

TABLE OF CONTENTS (Cont'd.)

DUE PROCESS BECAUSE IT HAS RESULTED IN THE SUSPENSION OF HIS PROFESSIONAL MEDICAL LICENSE IN THE ABSENCE OF THE MINIMALLY SUFFICIENT QUANTUM OF PROOF NECESSARY UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 42

CONCLUSION 51

APPENDIX

SECTION I. A-1
Opinion of the District Court of Appeal, First District, State of Florida. A-1

SECTION II. A-7
Final Order of the Board of Medical Examiners, State of Florida. A-7

SECTION III. A-12
Text of Statutes, Regulations and Constitutional Provisions Which the Case Involves. A-12

§390.001(7), Fla. Stat., Termination of Pregnancies. A-12

§458.331, Fla. Stat., Grounds for Disciplinary Action; Action by the Board. A-13

§768.45, Fla. Stat., Medical Negligence; Standards of Recovery. A-31

Florida Administrative Procedure Act, Chapter 120, Fla. Stat. A-39

TABLE OF CONTENTS (Cont'd.)

§120.57, Fla. Stat., Decisisions Which Affect Substantial Interests. A-39

§120.68, Fla. Stat., Judicial Review. A-52

Fla. Admin. Code, Rule 10D-72.16. A-61

U.S. Const., Amend. XIV, §1 Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement. A-62

SECTION IV.
Portion of Record Demonstrating That Both Federal Questions Were Timely and Properly Raised. A-63

SECTION V.
Summary of the Case. A-71

1. The Petitioner. A-73

2. The Petitioner's Medical Procedures. A-75

3. Case History and Testimony Relating to Holli Schmidt. A-82

4. Case History and Testimony on Christine Sellers Kuchar. A-101

5. Case History and Testimony Relating to Darlene Baker. A-116

TABLE OF CONTENTS (Cont'd.)

6. Conclusion. A-124

TABLE OF AUTHORITIES

Cases Cited	Page
Aiello v. City of Wilmington, Delaware 623 F.2d 845 (3d Cir. 1980	39
Baggett v. Bullitt 377 U.S. 362, 84 S.Ct. 1316 (1964)	41
Barry v. Barchi 443 U.S. 55, 99 S.Ct. 2642 (1979)	17, 42
Bell v. Burson 402 U.S. 535, 91 S.Ct. 1586 (1971)	18, 48
Bellotti v. Baird 428 U.S. 132 96 S.Ct. 2857 (1976)	50
Board of Regents of State Colleges v. Roth 408 U.S. 564, 92 S.Ct. 2701 (1972)	17
Bowling v. Department of Insurance 394 So.2d 165 (Fla. 1st DCA 1981)	43, 44 45,
Boyette v. State, Professional Practices Council 346 So.2d 598 (Fla. 1st DCA 1977)	46, 47
Coates v. City of Cincinnati 402 U.S. 611, 91 S.Ct. 1686 (1971)	22
Connally v. General Construction Co. 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926)	36, 39
Diebold, Inc. v. Marshal 585 F.2d 1327 (6th Cir. 1978)	40
Grayned v. City of Rockford 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	18-19

TABLE OF AUTHORITIES (Cont'd.)

Harman v. Forssenius
380 U.S. 528, 85 S.Ct. 1177 (1965) 50

Harris County Commissioners Court v. Moore
420 U.S. 77, 95 S.Ct. 870 (1975) 50

Intern. Soc. For Krishna Consc. v. Rochford
585 F.2d 263 (7th Cir. 1978) 19, 23

Kramer v. Santosky
102 S.Ct. 1388, 455 U.S. 745, 71 L.Ed.2d 599 (1982) 48

Lake Carriers' Association v. MacMullan
406 U.S. 498 92 S.Ct. 1749 (1972) 50

Mathews v. Eldridge
424 U.S. 319, 96 S.Ct. 893 (1976) 48

McDonald v. Department of Banking and Finance
346 So.2d 569 (Fla. 1st DCA 1977) 45

Murray v. Norberg
423 F.Supp. 795 (1976) 22

Musser v. State of Utah
333 U.S. 95, 68 S.Ct. 397 (1948) 23

Peden v. State Board of Funeral Directors and Embalm.
189 So.2d 526 (Fla. 3d DCA 1966) 47, 49

Procunier v. Martinez
416 U.S. 396, 94 S.Ct. 1800 (1974) 41

Reid v. Florida Real Estate Commission
188 So.2d 846 (Fla. 2d DCA 1966) 44

TABLE OF AUTHORITIES (Cont'd.)

Robinson v. Florida Board of Dentistry 477 So.2d 930 (Fla. 3d DCA 1984)	46, 47
Smith v. Goguen 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)	18
Southern Pacific Terminal Co. v. Interstate Commerce Commission 219 U.S. 498 31 S.Ct. 279, 55 L.Ed 310 (1911)	51-52
United States v. Professional Air Traffic Controllers 678 F.2d 1 (1st Cir. 1982)	36
Universal Camera Corp. v. NLRB 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)	45
Village of Hoffman Est. v. Flipside, Hoffman Est. 455 U.S. 489, 102 S.Ct. 1186 (1982)	16, 22
United States v. National Dairy Products Corp. 372 U.S. 29, 83 S.Ct. 594 (1963)	21-22
Zwickler v. Koota 389 U.S. 241, 88 S.Ct. 391 (1967)	49-50
Other Authorities	
U.S. Const. Amend. XIV	34, 40 42,
28 U.S.C. §2101(c)	3
Rule 20, Revised Rules of the Supreme Court	3

TABLE OF AUTHORITIES (Cont'd.)

§120.57, Fla. Stat.	43
§120.68, Fla. Stat.	43
§390.001, Fla. Stat.	27, 28
§458.331, Fla. Stat.	17, 19 36, 38
§458.331(1)(t), Fla. Stat.	4-10, 13, 16 34, 35 37, 38 39,
§466.028(1)(y), Fla. Stat.	46
§768.45, Fla. Stat.	19, 20
§768.50(2)(b), Fla. Stat.	20
Rule 10D-72.16, Fla. Admin. Code	27
Standards for Obstetric-Gynecologic Services, American College of Obstetrics and Gynecologists (5th ed. 1982)	11, 23 25, 26 28, 31 34, 37
Davis, Kenneth Culp, Administrative Law Treatise, West Publishing Co., St. Paul, Minn. 1958	45

CASE NO. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

_____

ALI A. AZIMA, M.D., PETITIONER,

v.

FLORIDA DEPARTMENT OF
PROFESSIONAL REGULATION,
BOARD OF MEDICAL EXAMINERS,
RESPONDENT.

_____

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

_____

The Petitioner, ALI A. AZIMA, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District Court of Appeal for the First District of Florida entered in his case on July 15, 1985.

OPINION BELOW

The opinion of the District Court of Appeal for the First District of Florida appears in the appendix hereto. The record of the Board of Medical Examiners and the record of the hearing are not included.

JURISDICTION

The judgment of the First District Court of Appeal of Florida, which affirmed the final order issued by the Florida Board of Medical Examiners suspending Petitioner's medical license, was entered on July 15, 1985. Petitioner sought a rehearing which was denied on August 26, 1985. Petitioner then timely filed his notice to invoke discretionary jurisdiction of the Florida Supreme Court on September 23, 1985. On January 24, 1986, the Supreme Court of Florida denied certiorari and refused to entertain a motion for rehearing. This Petition for Writ of Certio-

rari was filed within ninety (90) days of that date as required by Rule 20 of the Revised Rules of the Supreme Court of the United States and 28 U.S.C. §2101(c).

STATEMENT OF THE CASE

A. Summary of Findings and Recommendations

This petition arises from the suspension of Petitioner's medical license by the Florida Board of Medical Examiners and Department of Professional Regulation, based upon a finding that his treatment of three patients violated §458.331(1)(t), Florida Statutes, which authorizes such suspension for medical malpractice.

On February 7 and 8, 1984, an administrative hearing was held in Ft. Myers, Florida, before Diane D. Tremor, Hearing Officer for the Florida Department of Administrative Hearings. On July 24, 1984, Ms. Tremor submitted a Recommended Order to the Board of Medical Examiners (hereinafter "BOME") in which Hearing Officer Tremor found Respondent/Petitioner's (hereinafter "Petitioner") treatment of three patients to be in viola-

tion of §458.331(1)(t), Fla. Stat., and concluded that such treatment constituted medical malpractice. She recommended a one-year suspension of Petitioner's medical license.

A short hearing was conducted before the BOME on December 1, 1984, in which the Board adopted the Hearing Officer's findings of fact and conclusions of law in toto. The BOME increased the recommended penalty and specifically ordered that:

> 1. Respondent's license to practice medicine in Florida shall be suspended for a period of one year, with the specific provision that in six months Respondent may request that the Board stay the second six months of the suspension.
>
> 2. Upon the termination or stay of the suspension, Respondent's license to practice medicine in Florida shall be placed on probation for a period of three years, subject to the term and condition that Respondent make

semi-annual appearances before the Board.

3. During the periods of suspension and probation, Respondent shall earn fifty (50) hours of Category 1 continuing medical education annually.

[R. 750, 751].

B. Summary of Issues

By administrative complaints filed on March 15, 1983 (Case No. 83-1205) and August 2, 1983 (Case No. 83-2589), the Department of Professional Regulation (hereinafter "DPR") charged ALI A. AZIMA, M.D., with violating §458.331(1)(t), Fla. Stat., with regard to his medical treatment of five patients. The Complaint filed on March 15 contained four counts and related to patients Christine Ann Sellers (now Christine Kuchar) (Count I), Holli Schmidt (Count II), Coleen Lundy (Count III), and Kathy Holloway (Count IV). The Complaint filed on August 2, 1983, contained

two counts, both of which related to patient Darlene Baker.

Count IV of the Complaint filed on March 15, 1983, and Count II of the Complaint filed on August 2, 1983, were voluntarily dismissed, with prejudice, at the commencement of the final hearing. Therefore, only the first three counts of the March 15 Complaint and Count I of the August 2 Complaint were considered by the Hearing Officer and the BOME.

Issues

Based on Count I of the Complaint filed on March 15, 1983, the Hearing Officer found that in performing a termination of pregnancy procedure on Christine Sellers Kuchar (hereinafter "Kuchar"), Petitioner violated §458.331(1)(t), Florida Statutes, because he failed to obtain a patient medical history, including a determination of the

patient's Rh factor, and failed to send the tissue specimen to a pathologist.

Count II of the March 15, 1983, Complaint charged that with respect to patient Holli Schmidt, Petitioner negligently inserted an intrauterine contraceptive device (IUD) when she was twelve weeks pregnant, failed to take vital signs, failed to perform blood work and that on two subsequent occasions counseled her without performing any examination to ensure that she was not pregnant.

The Hearing Officer concluded that the evidence did not establish that the taking of vital signs or the performance of blood work were necessary prior to the insertion of an IUD, or that the patient was twelve weeks pregnant when she last saw the Petitioner. The Hearing Officer did, however, find that Petitioner, in violation of §458.331(1)(t), Fla. Stat., inserted an IUD

into patient Schmidt without taking adequate precautions to ensure that the patient was not pregnant at the time of insertion.

Petitioner was found not guilty of the allegations contained in Count III of the March 15, 1983, Complaint. Count IV of the same Complaint was voluntarily dismissed.

As to Count I of the Complaint filed on August 2, 1983, the Hearing Officer determined that in performing a termination of pregnancy procedure on patient Darlene Baker, Petitioner violated §458.331(1)(t), Fla. Stat., by failing to send the tissue specimen to a pathologist for evaluation. Count II of this Complaint was voluntarily dismissed.

In summary, it was found that Petitioner's conduct constituted the commission of "gross or repeated malpractice or the failure to practice medicine with that level of care, skill and treatment which is recognized

by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." §458.331(1)(t), Fla. Stat. This finding was based on the Hearing Officer's conclusions that Petitioner failed to send tissue specimens to a pathologist for examination after performing termination of pregnancy procedures on patients Kuchar and Baker, failed to determine the Rh factor of patient Kuchar, and did insert an IUD into patient Schmidt without taking adequate precautions to ensure that she was not pregnant at the time of insertion. The remaining charges in the two Complaints were either dismissed or were insufficiently established by competent substantial evidence. (R. 700-703).

In support of the findings against Petitioner, the DPR presented the testimony of patients Baker and Kuchar; Drs. Constantine Yankopolus, Randall Paul Cowdin, and

Philip F. Waterman, II, each of whom practice together in the same office in Fort Myers, Florida, and each of whom are in direct competition with the Women's Health Clinic operated by Petitioner. The DPR also put on Dr. Craig B. Sibley, who also practices in Fort Myers, Florida, and is a direct competitor of Petitioner's Women's Health Clinic. All of the expert medical witnesses who testified against Petitioner treated one or more of the complaining patients. The DPR also presented the testimony of Theodore M. Purcell, an investigator for the DPR.

The crux of Petitioner's position is that all of the testimony elicited at the hearing established that his procedures were in full compliance with the published American College of Obstetrics and Gynecology (hereinafter "OB/GYN") standards. There is absolutely no testimony that Petitioner viola-

ted or fell below any published or uniformly recognized standards. The testimony at best established that his practices and procedures, while admittedly meeting the published standards, fell below medical standards established solely by the testimony of four physicians, all of whom were direct competitors of Petitioner's Women's Health Clinic.

Petitioner testified on his own behalf. He also presented the testimony of George Chiu, the Director of Medical Information at Fort Myers Community Hospital, and Anne Wilke, the Executive Secretary for the Lee County Medical Association.

The DPR's Exhibits A through D and F through H were received into evidence as well as Petitioner's Exhibits 1, 2 and 3.

Petitioner refers the Court to Section V of the Appendix which contains a summary of facts material to this Court's consid-

eration of the questions presented. In this summary, Petitioner has attempted to present portions of the record in an objective manner in order to demonstrate that Petitioner had no prior notice of the medical standards by which it was held that he violated §438.331(1)(t), Fla. Stat., and to demonstrate that the DPR did not prove essential allegations of law and fact by a preponderance of competent substantial evidence.

Specifically, Petitioner contests findings that:

a. He was legally obligated to determine the Rh factor of Ms. Kuchar's blood;

b. He did not determine the Rh factor of Ms. Kuchar's blood; and

c. He was required by law to send the abortion tissue

> for a pathological examination when Petitioner, in accordance with the only standards of his profession which he could have been aware of, clearly determined through a detailed visual examination that fetal remains were present and the abortion was successful.

The federal questions presented for this Court's review were not raised until Petitioner's appeal from the final order of the BOME. This is because the state administrative agency had no jurisdiction to deal with constitutional issues. Both federal questions were presented for the first time in Petitioner's briefs to the District Court of Appeal for the First District of Florida. Pertinent quotations from specific portions

of Petitioner's briefs, showing that the federal questions were timely and properly raised, are presented in Section IV of the Appendix. The District Court of Appeal did not pass directly on either constitutional issue.

If there remains uncertainty that each federal question was adequately raised before the state court, Petitioner refers this Court to his discussion of each reason for granting the writ. In that discussion, Petitioner presents reasons why this Court should not invoke the abstention doctrine.

REASONS FOR GRANTING THE WRIT

I. SECTION 458.331(1)(t), FLA. STAT., IS UNCONSTITUTIONAL BECAUSE IT LACKS REASONABLY CLEAR GUIDELINES SO AS TO PREVENT OFFICIAL ARBITRARINESS IN THE REVOCATION OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST AND HAS BEEN APPLIED IN A MANNER WHICH IS SO VAGUE THAT IT DENIED PETITIONER ADEQUATE NOTICE OF THE STANDARDS FOR ENFORCEMENT.

This Court has stated that "perhaps the most important factor affecting the clarity that the constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 499, 102 S.Ct. 1186, 1193 (1982).

Petitioner, as a physician licensed to practice medicine by the State of Florida, holds a sufficient claim of entitlement to his license to invoke the protection of the due process clause because that license can

only be suspended upon a satisfactory showing that he has committed an act in violation of §458.331, Fla. Stat. Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649 (1979); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

Florida law has provided Petitioner with a property interest in his license because revocation or other disciplinary action regarding his medical license is not discretionary. Rather, all disciplinary action taken by the DPR and the BOME against a medical license must occur pursuant to §458.331, Fla. Stat. See Barry v. Barchi, 443 U.S. 55 at 64, 99 S.Ct. 2642 at 2649.

Once a license is issued, as in Petitioner's case, its continued possession may become essential to the pursuit of a livelihood. The suspension of Dr. AZIMA's license

involves state action that adjudicates a most important interest of this licensee: employment in his medical profession. Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589 (1971). Petitioner's constitutional protections provided by the fourteenth amendment limit the state's power to terminate this entitlement regardless of whether his interest is denominated a "right" or a "privilege." Id.

When a statute is challenged under the due process doctrine of vagueness, a court must determine: (1) whether the statute provides sufficient notice of what may not be done, and (2) whether it contains reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement. Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); Grayned v. City of Rockford, 408 U.S.

104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); Intern. Soc. For Krishna Consc. v. Rochford, 585 F.2d 263, 269 (7th Cir. 1978).

Section 458.331, Fla. Stat., provides,[1] in part:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph. (Emphasis added).

---

[1]Both §458.331 and §768.45, Fla. Stat., were modified during 1985. See Section III of the Appendix for the fully revised text and an explanation of the changes.

Section 768.45, Fla. Stat., which governs civil standards for recovery in medical malpractice actions, provides in part:

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances. (Emphasis added).
>
> * * *
>
> (2) (b) If the health care provider whose negligence is claimed to have created the cause of action is certified

> by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:
>
> 1. Is trained and experienced in the same specialty; and
> 2. Is certified by the appropriate American board in the same specialty.

These interrelated statutory standards give a physician absolutely no warning, guidance or notice of what conduct will render him subject to administrative sanctions.

The constitutionality of a statute, with regard to vagueness or overbreadth is generally not considered by this Court in terms of the statute "on its face," but rather is reviewed within the context of specific conduct to which the statute has been applied. United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 595

(1963). Recognizing that the speculative danger of arbitrary enforcement may not in and of itself render a statute void for vagueness, see Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 457, 102 S.Ct. 1196; and Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686 (1971), Petitioner is aggrieved because the application of the statutory standard to his conduct did violate his rights to due process. Murray v. Norberg, 423 F.Supp. 795, 801 (1976). "Vagueness ... ordinarily constitutes a violation of due process only where the aggrieved party can show that the statute ... fails to give adequate notice of some duty that government imposes...." Id.

This Court has consistently held that a limiting construction, by state courts, of what would otherwise constitute an unconstitutionally vague statute, can render the stat-

ute constitutional. Musser v. State of Utah, 333 U.S. 95, 68 S.Ct. 397 (1948). However, no limiting construction has been given to §458.331, Fla. Stat. Rather, in the case at bar the First District Court of Appeal affirmed a decision of the BOME which was founded upon a statute so lacking in reasonably clear guidelines that it fails to prevent official arbitrariness in enforcement or to put physicians on notice as to what conduct is proscribed or subject to discipline. Krishna v. Rochford at 269. In fact, the standards by which Petitioner was judged were contrary to his reasonable expectations. The unrefuted testimony is that Petitioner complied with all published American College of OB/GYN standards. The only standards which he failed to follow were those arbitrary standards established solely by the self-serving testimony of those doctors who provide his only competi-

tion and who do not share his opinion regarding the community benefits of a women's health clinic.

For example, Petitioner was specifically disciplined for his failure to send Ms. Kuchar's products of conception for a pathological analysis. This finding of guilt was based wholly upon expert witness testimony that all products of conception must be sent to pathology. (R. 232, 249, 271 and 278). Petitioner, however, testified that there was no need to send Ms. Kuchar's tissue for pathological analysis because fetal parts were readily recognizable, a fact which was in no way contradicted. (R. 428). Rather than contradict his factual testimony, the expert witnesses testified that regardless of whether fetal parts are recognized, all tissue must be submitted for pathological analysis. (R. 232, 249, 271 and 278). This expert tes-

timony, which established the standards under which Petitioner's license was suspended, was in direct conflict with the published American College of OB/GYN standards. (R. 232, 249, 271 and 278). Those standards provide in part as follows:

At page 52, the Standards reveal:

> In the situation of elective termination of pregnancy, the attending physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination. (Emphasis added).

At page 54, under the heading "Abortion," the Standards specifically state:

> If villi or fetal parts are not identified with certainty, the tissue specimen must be sent for further pathologic examination, and the patient must be alerted to the possibility of ectopic pregnancy. (Emphasis added).

At page 66 of the Standards, under the heading "Gynecologic Surgery," is the following:

> Tissue removed should be submitted to a pathologist for examination. The patient should be informed of the tissue diagnosis. An exception to the practice may be in elective terminations of pregnancy in which definitive embryonic or fetal parts can be identified. In such instances, the physician should record a description of the gross products. Unless definite embryonic or fetal parts can be identified, the products of elective interruptions of pregnancy must be submitted to a pathologist for gross and microscopic examination. (Emphasis added).
>
> (R. 232, 278).

Standards for Obstetric-Gynecologic Services, American College of Obstetrics and Gynecologists (5th ed. 1982).

Given that there were, as per the Standards' dictates, recognizable fetal parts, Petitioner did not send those speci-

mens to pathology but, rather, disposed of them in a sanitary manner.[2] Petitioner performed all that was required of him by the

---

[2]All that is required by the Florida legislature is that fetal remains be disposed of in a sanitary and appropriate manner. Section 390.001, Fla. Stat., provides in part:

> (7) FETAL REMAINS.-- Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices, as provided by rule of the Department of Health and Rehabilitative Services....

The Department of Health and Rehabilitative Services' rules promulgated pursuant to §390.001, Fla. Stat., similarly require no more than disposal in a sanitary, nuisance free manner. Fla. Admin. Code, Rule 10D-72.16 provides:

> 10D-72.16 Disposal of Fetal Remains. All fetal remains shall be disposed of in a sanitary, nuisance free manner. Incineration or burial of such remains, as well as other nuisance free methods, are acceptable so long as the licensing agency is

FOOTNOTE CONTINUED ON NEXT PAGE.

American College of OB/GYN standards and Florida law.

When these standards are juxtaposed alongside the testimony of the doctors presented by the DPR as experts, the constitutional infirmity is laid bare:

Dr. Cowdin not only disagreed with the published standards on this matter, but went so far as to find the very standards which govern his profession to be below acceptable medical standards. He testified as follows:

> Q. I will read you the Standards for Obstetric-Gynecologic Services, published by the American College of Obstetricians and Gynecologists, Page 52: In the situation of elective termination of pregnan-

---

> assured that the disposal method utilized is nuisance free.

As such, Petitioner's procedures regarding termination of pregnancies is fully in compliance with §390.001, Fla. Stat.

cy, the attending physician should record a description of the gross products.

Now, you don't do that in all cases, right?

A. Correct.

Q. Unless definite embryonic or fetal parts can be identified, the products of conception must be submitted to a pathologist for gross and microscopic examination.

Do you agree with that?

A. No, I think all tissues should be submitted.

Q. So you disagree with those standards?

A. Correct, because whether or not there is embrionic [sic] tissue present does not rule out a concomitant hydatiform [sic] or a carcinoma.

Q. Do you think you or someone else has or should inform them of this?

A. I think it would be a good idea.

(R. 278)
(Emphasis added).

When Dr. Yankopolus was asked about the standards, this dialogue followed:

> Q. If a patient comes to see an OBGYN for the purpose of terminating a pregnancy and the pregnancy is in fact or the abortion procedure is performed and the products of conception are not forwarded to a pathologist for examination although the doctor has visually examined the products of conception, in your opinion would that doctor's treatment, medical treatment of that patient, fall below an acceptable standard of care?
>
> A. Absolutely.
>
> Q. Why is that?
>
> A. I don't feel that visual examination of tissue is adequate for the determination as to whether or not there are chorionic villi present. In certain cases the documentation of that requires microscopic examination by a trained pathologist.
>
> (R. 249).

Later during the hearing when the published OB/GYN standards were brought to his attention, Dr. Yankopolus responded as follows:

Q. What does it say; what does it say here?

A. 1981 Committee on Professional Standards.

Q. Now, can you look on Page 52. There is something underlined in yellow. Could you read it to the hearing officer?

A. In a situation of selective termination of pregnancy, a physician should record a description of the gross products definitely being identified as products of elective interruptions, and if not easily identifiable, they must be submitted to a pathologist for gross and microscopic examination.

Q. Does this say that you should record the gross examination? And you don't? Because you feel that you are not capable of doing this.

A. That's correct.

Q. Does this mean that you fall below the standards, Doctor?

A. In fact, I am above the standards.

Q. Above the standards? Okay.

(R. 232).
(Emphasis added).

While Dr. Yankopolus may choose to practice above the standards required by his profession, certainly Dr. AZIMA should not be denied his right to practice medicine for scrupulously following the published standards dictated by his profession.

Perhaps the most telling testimony of all came from Dr. Cowdin and it speaks directly to, and emphasizes, the arbitrary standards employed against Petitioner:

Q. Does the Lee County Medical Society have any standards that you know of?

A. With regards to what?

Q. Falling below the standard if the Rh factor is not determined by the doctor; sending the results to a pathology [sic]; taking the hemoglobin count. All of those things that you said if it wasn't done it falls below the standard; does the Lee County Medical Society have those standards?

A. As to whether or not they have them formally stated out, I am not certain.

Q. Why aren't you certain? You know they don't. Why are you alleging--

A. I think the standard of care, if I may so state, is something that is dictated by the practicing physicians in that community and the manners in which they practice their medicine.

Q. Do they tell each other, then, what they do?

A. Certainly.

Q. When did you tell Dr. Azima what your standards are?

A. I never have.

Q. When did he tell you what his standards are?

A. He never has.

Q. But that's how they are determined, by one doctor telling another; is that what you have testified to?

A. I think that's a reasonable statement.

Q. All right. Let's go on. You have stated that it falls below the standards if the remains of the abortion are not sent to pathology. I think we have established that about 10 times, right?

A. Right.

(R. 270-271).
(Emphasis added).

It was this testimony, and not the published American College of OB/GYN standards or any other reasonably objective standards, by which Petitioner was found guilty of violating §458.331(1)(t), Fla. Stat., and it is this arbitrary method of establishing standards of enforcement which renders §458.331(1)(t) violative of the Fourteenth Amendment to the United States Constitution.

The most disturbing factor regarding prosecutions under §458.331(1)(t), Fla. Stat., is that a doctor may be denied the right to practice medicine based on unwritten and uncodified standards. These standards may be established by a loosely assembled group of his ostensible peers who are his competitors or who may disagree with his political or societal views, e.g., the propriety of operating a women's health clinic. As such, medical licensees are put on no notice whatsoever regarding what conduct is prohibited. This leaves the DPR free to create and enforce standards which are developed at will, promulgated ad hoc, and enforced ex post facto. If a physician cannot be assured of the continued possession of his license by following to the letter the published standards of his profession, then no physician

can fully serve his profession, nor practice with confidence.

Petitioner was never provided any warning of the standards which were used to judge his medical practice. Government regulation cannot proscribe the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); United States v. Professional Air Traffic Concrollers, 678 F.2d 1, 3 (1st Cir. 1982).

Petitioner has had a valuable property right taken from him for behavior which he could not reasonably understand to be proscribed and which he had no way of knowing constituted a violation of §458.331, Fla. Stat. (R. 369-421).

The standard which is required by §458.331(1)(t), Fla. Stat., is "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." Petitioner has demonstrated that his treatment of Christine Sellers, Holli Schmidt and Darlene Baker fully complied with the only recognized and published standards applicable to his specialty, i.e., those standards set by the American College of OB/GYN. (See Appendix Section V). But the Hearing Officer and the BOME, instead of relying on these published standards, relied solely upon the testimony of competitors to establish arbitrary standards, more stringent than those established by the American College of OB/GYN. Petitioner had no notice whatsoever of these arbitrary standards. (R. 692-708, 709-751).

It is evident from the record that Petitioner has had a valuable property right taken from him for behavior which he could not reasonably understand to be proscribed. The DPR presented expert testimony of four interested witnesses to establish a new standard of care, skill and treatment, which is above that set by the American College of Obstetrics and Gynecology; and the testimony of these same witnesses is so inconsistent as to cause great doubt that a reasonably prudent similar physician could be expected to recognize this new standard as the minimally acceptable standard of care, skill and treatment required by §458.331, Fla. Stat. (See Appendix Section V for a synopsis of the significant conflict among the experts regarding standards of medical practice).

This application of §458.331(1)(t), Fla. Stat., to Petitioner's practice clearly

violated the first essential of due process of the law because men of common intelligence differed in opinion as to its application. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); see also Aiello v. City of Wilmington, Delaware, 623 F.2d 845, 850 (3d Cir. 1980. (See Appendix Section V). The only relevant standards of practice which Petitioner had notice of were the written standards promulgated by the American College of OB/GYN and, therefore, these were the only standards by which Petitioner could determine "that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." §458.331(1)(t), Fla. Stat. There was no testimony that Petitioner violated the written published standards; to the contrary, the

testimony revealed that he followed these standards scrupulously.

Because the DPR chose to apply new and arbitrary criteria which have never been published or otherwise communicated, the decision below is violative of Petitioner's due process rights. Diebold, Inc. v. Marshal, 585 F.2d 1327 (6th Cir. 1978). The statute in question has been applied in an arbitrary and otherwise constitutionally invalid manner. This vague application of the statute in question has resulted in an unconstitutional taking of Petitioner's property interests in violation of the Fourteenth Amendment to the United States Constitution.

If there remains doubt that Petitioner sufficiently presented this federal due process question before the state courts, Petitioner prays for the following reasons that this Court not invoke the abstention

doctrine. The statute in question is vague to individuals to whom it plainly applies because these licensees cannot understand what is required of them. Nor is it in the public interest that medical doctors foreswear all activity which is arguably within the scope of the statute's vague terms. Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800 (1974). The abstention doctrine is not appropriate because the statute is lacking in terms susceptible of objective measurement. Baggett v. Bullitt, 377 U.S. 362, 84 S.Ct. 1316 (1964).

II. THE DECISIONS BELOW ARE BASED ON A THRESHOLD STANDARD OF SUBSTANTIAL COMPETENT EVIDENCE, WHICH STANDARD IS VIOLATIVE OF PETITIONER'S RIGHT TO DUE PROCESS BECAUSE IT HAS RESULTED IN THE SUSPENSION OF HIS PROFESSIONAL MEDICAL LICENSE IN THE ABSENCE OF THE MINIMALLY SUFFICIENT QUANTUM OF PROOF NECESSARY UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As noted above, the continued possession of Petitioner's medical license is essential to his livelihood such that a suspension of that license is an adjudication of a valuable and important interest. (See p. 7, infra). Any suspension of Petitioner's license must be in accord with the procedural due process required by the Fourteenth Amendment of the United States Constitution. Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979).

For the administrative adjudication of rights, the State of Florida utilizes a vague, "sliding scale" standard of substan-

tial competent evidence, §§120.57(1)(b)(9) and 120.68(10), Fla. Stat.,[3] which requires that a licensee's violation be proven "by evidence which weighs as 'substantially' on a scale suitable for evidence as the penalty does on the scale of penalties." Bowling v. Department of Insurance, 394 So.2d 165, 172 (Fla. 1st DCA 1981). Notwithstanding the artful nature of this analogy, it is a subjective standard whose threshold requirements are not commensurate with the protections afforded Petitioner's property rights under the fourteenth amendment. In adopting this standard of substantial competent evidence, the State of Florida has retreated from the higher standard of "clear and convincing proof" which was applied in license revoca-

---

[3]§§120.57 and 120.68, Fla. Stat., are relevant portions of the Florida Administrative Procedure Act and have been reproduced in Section III of the Appendix.

tion proceedings prior to the adoption of the Florida Administrative Procedure Act. See Bowling v. Department of Insurance, supra, at 171; see also Reid v. Florida Real Estate Commission, 188 So.2d 846, 851 (Fla. 2d DCA 1966).

The deficiencies of this vague evidentiary standard have not been remedied by the courts of Florida. The Bowling court acknowledged that when a proceeding may result in the loss of a professional license, "the critical matters in issue must be shown by evidence which is indubitably as 'substantial' as the consequences," Bowling, supra, at 172, but that court's allegiance to the due process standard was not put to the test under the facts in Bowling. In cases which do not envelop due process questions of constitutional proportion, the courts of Florida have recited Justice Frankfurter's statement

made in Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456, 467 (1951):

> The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. See Bowling at 172 and McDonald v. Department of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977).

But, as noted by Professor Kenneth C. Davis, "[T]he plain reality is that the substantial evidence rule as the courts apply it is a variable." 4 Administrative Law Treatise, sec. 29.02, p. 126.

Petitioner contends that essential proof of guilt must be established by more than mere substantial competent evidence before his license can be taken by an administrative board. The case at bar is distinguishable from other Florida appellate holdings which, under Florida's substantial competent evidence standard, have resulted in the

reversal of similar license revocations. See Boyette v. State, Professional Practices Council, 346 So.2d 598, 599-560 (Fla. 1st DCA 1977), where an administrative order revoking a teacher's certificate was held to be unsupported by substantial competent evidence because it was determined that the order was not even supported by a preponderance of the evidence. In Robinson v. Florida Board of Dentistry, 477 So.2d 930 (Fla. 3d DCA 1984), a license suspension was reversed upon a finding that "[o]ne professional's opposing opinion, without more, on a particular treatment is neither substantial competent evidence nor a measure of 'generally prevailing peer performance.' Cf. §466.028(1)(y), Fla. Stat." Id. at 932.

The issues raised by both Boyette and Robinson are distinguishable from the issue raised herein by Petitioner. Both the

Boyette and Robinson courts merely addressed whether there was a clear preponderance of evidence upon which to support a license revocation. While Petitioner also denies that his license revocation was supported by a preponderance of evidence, the issue he raises here is that the vague standard of competent substantial evidence, which was applied to Petitioner's license revocation proceedings, does not satisfy procedural due process requirements.

This precise issue was presented in Peden v. State Board of Funeral Directors and Embalm., 189 So.2d 526, 527-529 (Fla. 3d DCA 1966), but the reviewing court refused to address it.[4]

---

[4]In his concurring opinion to the Peden case, Justice Carroll suggested that in a license revocation proceeding, due process requires at a minimum "that such charges must be proved by a preponderance of the evidence." Id. at 529.

Petitioner contends that under Florida law, the standard requiring some substantial competent evidence as a predicate to license revocation by an administrative board, is a vague standard which does not satisfy constitutional requirements of due process. This Court's earlier holdings which deal with licenses, property interests and individual rights suggest that the evidence against Petitioner must be so clear, strong, and unequivocal as to remove reasonable doubt as to the guilt of the Petitioner. Bell v. Burson, supra, 91 S.Ct. 1586 at 1589-1590, 402 U.S. 535 at 539-441 (driver license revocation); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) (revocation of Social Security benefits); Kramer v. Santosky, 102 S.Ct. 1388, 455 U.S. 745, 71 L.Ed.2d 599 (1982) (revocation of parental interests in natural child). In contrast, the subjective

standard, calling only for some competent substantial evidence to support penal sanctions against Petitioner, borders on the same criteria applied in ordinary civil proceedings and amounts to a taking of an important interest based on little more than a preponderance of the evidence.

Petitioner contends that this federal due process question has been sufficiently presented before the state courts. The due process implications of this vague "sliding scale" standard of evidence have also been presented in Peden, supra. Therefore, the state courts have been given an opportunity to vindicate the federal claim.

Furthermore, abstention is not to be ordered unless the state statute is of an uncertain nature and subject to a limiting construction. Zwickler v. Koota, 389 U.S.

241, 251, 88 S.Ct. 391, 397 (1967); Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181 (1965). The applicability of the statute challenged herein, however, is not uncertain, Lake Carriers' Association v. MacMullan, 406 U.S. 498, 511, 92 S.Ct. 1749, 1757-1758 (1972), because the state courts have interpreted this statute. Yet, the Florida judiciary has not construed the statute in a manner which avoids in whole or in part the federal constitutional infirmity. Bellotti v. Baird, 428 U.S. 132, 132-133, 96 S.Ct. 2857, 2859 (1976). Furthermore, the vagueness claim goes to the obligatory standards imposed by the statute. Due to the above factors, the abstention doctrine is not appropriate. Harris County Commissioners Court v. Moore, 420 U.S. 77, 86, 95 S.Ct. 870, 876-877 (1975).

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment and opinion of the District Court of Appeal for the First District of Florida.

The issues presented to this Court are of great importance not only to medical practitioners in Florida, but to all licensed professionals and the people they serve. This Court has not heretofore addressed the notice requirements and evidence standards which are required to revoke such an important property interest.

Petitioner's license was suspended for one year ending January 15, 1986, at which time he began a three year probationary period. The unconstitutional suspension of professional licenses for brief periods of time is a repetitive state action which may evade review. Southern Pacific Terminal Co.

v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed 310 (1911).

The sanctions imposed by the Florida Board of Medical Examiners prevent Petitioner from practicing medicine in a reasonable and constitutionally protected fashion. Furthermore, the stigma of the disciplinary actions has and will continue to have a detrimental effect on his ability to earn a living.

These sanctions have caused and continue to cause Petitioner's patients to lose confidence in his ability to practice medicine. This suspension, while relatively short in duration, has also made it impossible for Petitioner to obtain medical mal-

practice insurance at reasonable rates and to be granted hospital privileges.

Respectfully submitted,

BERNARD H. DEMPSEY, JR., ESQ.
FERDINAND M. ROMANO, ESQ.
RICHARD LEE BARRETT, ESQ.
DEMPSEY & GOLDSMITH, P.A.
Suite 500, Day Building
605 East Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
ALI A. AZIMA, M.D.